Committee on Resources

Subcommittee on National Parks and Public Lands

Testimony

STATEMENT OF DAVID H. GETCHES[(1)]

The authority of the Executive to withdraw public lands from the operation of the public land laws has a venerable but sometimes contentious history. Often, withdrawal authority has been indispensable in rescuing lands from abuses under those laws. At times, the Executive has encountered the wrath of Congress or an individual state's government when it has acted to reserve or withdraw public lands. But usually the Executive action has been viewed as essential to conserving national assets. Indeed, history has judged virtually every major withdrawal -- especially those that were the most controversial in their time -- as wise.

The practice of withdrawal was, for many years, an imprecise, even disorderly affair. It does not overstate the matter to say that the President, for most of the nation's history simply withdrew whatever lands he viewed as threatened, or that were needed for a particular public use or purpose, from the operation of whatever land public land laws might be in conflict.[(2)]

Over the years, Congress passed laws encouraging some types of withdrawals (e.g., Antiquities Act, 16 U.S.C. §431; Taylor Grazing Act, 43 U.S.C. §315), limiting the extent of withdrawals for some purposes (e.g., Defense Withdrawals Act, 43 U.S.C. §155), and clarifying the nature of the Executive's authority to make withdrawals (Pickett Act of 1910). When those statutes fit the situation, the Executive used them to make withdrawals. When they did not the Executive made the withdrawals anyway.

The Executive's non-statutory withdrawals were regularly upheld by the courts. See *United States v. Midwest Oil*, 236 U.S. 459 (1915). The United States Supreme Court in *Midwest Oil* found that, although Congress has power to manage the public lands under the Property Clause of the Constitution, it had long acquiesced in the President's actions in making withdrawals. Thus, the President had "implied authority" that existed because Congress must have known of the withdrawals but failed to reverse them or to limit the Executive's actions.

The Supreme Court concluded that upholding the President's authority based on continued usage was reasonable because "government is a practical affair intended for practical men." *Midwest Oil*, 236 U.S. at 472. The Court understood how important it was for the Executive to be able to act, often in the face of urgency, in hundreds of cases, and to consider the situation of millions of acres of diverse lands. It understood also how unrealistic it would be for Congress to take up the details of each such case.

Public land withdrawals largely outside a statutory framework perhaps fit an earlier time when there was little coherence or policy direction in management of the public land resources. But regimes of land protection and use that varied so substantially with Administrations did not fit as well in a later era when Congress and the public was demanding greater stewardship and more scientific and efficient use of nationally-owned resources.

The landmark study by the Public Land Law Review Commission (PLLRC) entitled *One Third of the*

Nation's Land found that the outmoded land disposal policies of the past were reflected in many old laws still on the books. These laws were not in accord with current policies of conservation and management of the federal lands. In particular it found that withdrawal practices had been exercised in an "uncontrolled and haphazard manner." So the PLLRC recommended sweeping reform of the public land laws, including procedures of making withdrawals.

Congress carefully considered the PLLRC's recommendations, then enacted revolutionary legislation, most notably the Federal Land Policy Management Act of 1976 (FLPMA). At last, the Bureau of Land Management got an organic act, telling it to take greater stewardship over the lands under its jurisdiction.

In FLPMA, Congress required that land management agencies engage in land use planning for rational programs for use and intensive management of public lands for multiple purposes. It anticipated that planning would dramatically shape and direct the types of uses allowed and would be implemented through exercises of considerable discretion aimed at specific tracts. Therefore, it gave land managers new authority and responsibilities. In light of these duties and powers, why would the Secretary also need to use the old method removing blocks of land from the operation of the public land laws through withdrawals?

Congress, like the PLLRC, was concerned about how the Executive had used its authority to withdraw public lands in the past and it took matters in hand. In FLPMA, it repealed some 29 statutes allowing for withdrawals and it repealed the President's "implied authority" to make withdrawals. But it knew that the withdrawal tool remained important. This was so because FLPMA left some gaps in public land management.

Compromises were made in drafting and passing FLPMA to preserve some anachronisms in public land law that had continuing support among members of Congress. Notably, the General Mining Law still allowed private parties to stake and develop mineral claims on much of the nation's public lands, and FLPMA specifically restricted the land managers' discretion to regulate or interfere with this time-honored practice. This extraordinary prerogative in the hands of private parties suggested the need for some method of preserving the public's interest in affected lands. Furthermore, Congress saw that, notwithstanding all the planning and management expected under FLPMA and other public land laws, emergencies would arise, public opinion and the government's needs to use particular lands would change, and some public land uses could threaten other uses in ways not foreseeable or controllable under the public land laws. And when these situations arose, the Executive needed to be able to act -- and to tip the balance in favor of conservation.

So Congress perpetuated strong, extensive Executive authority to withdraw public lands from the operation from any and all uses under the public land laws. The Secretary of the Interior was given broad powers in §204 of FLPMA. But the exercise of those powers was surrounded with procedures tailored by Congress to the size and duration of the withdrawal.

Congress remains involved in the process as well. Congress is able to trigger emergency withdrawals and the Secretary must respond. And the Secretary is required to report withdrawals to Congress. Large withdrawals must be carefully studied and a NEPA-like report must be made by Congress on the details of the withdrawal. The Secretary must also hold public hearings regarding FLPMA withdrawals. These procedural requirements are intended to assure that the Secretary does not act cavalierly, and they provide Congress with the information it needs to act quickly to modify or reverse the Secretary's decision if it disapproves.[(3)]

Furthermore, Congress provided procedures for revoking or modifying public land withdrawals. Many

withdrawals in the past had been made without sufficient care, some were imprecisely defined, and some had been left unmodified even as conditions changed. Consequently, Congress also required the Secretary to undertake a review of the hundreds of old withdrawals on the books in order to "clean up" the public land rolls, attempting to ensure that unnecessary withdrawals were removed and necessary ones were perpetuated or fine-tuned to present demands.

Today, the Secretary has a rule-book to follow in making withdrawals set forth in section 204 of FLPMA. His authority is vitally important in protecting the health of the public lands. Indeed, it is a management tool every landowner must have -- the ability to make quick decisions when new conditions arise, different opportunities are presented, or more public values can be fulfilled. A private property owner would not give up the prerogative to be flexible in protecting its land as conditions and or the owner's objectives change, and Congress has ensured in FLPMA that the American public retains that essential attribute of property in the federal public lands that are so important to our heritage.

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2. See generally David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 Nat. Resources J. 279 (1982).

3. The method prescribed by FLPMA for congressional disapproval of secretarial withdrawals by concurrent resolution has been thrown into doubt by the decision in *INS v. Chadha*, 462 U.S. 919 (1983). But Congress retains the power it always has had to legislate to modify or reverse the Secretary's withdrawal decision.

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